TNT Logistics North America, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO. Case 30–CA-16801–1

May 4, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 9, 2005, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel and the Charging Party filed answering briefs; and the Respondent filed a reply brief to each of the answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified[3] and set forth in full below.

Based on the facts set out below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union concerning the effects on employees of its closing of its Janesville, Wisconsin facility.[4] We further agree with the judge, for the reasons stated in his decision, that a remedial order consistent with *Transmarine Navigation Corp*., 170 NLRB 389 (1968), is appropriate.

A. The Facts[5]

The Respondent performed logistic services for the General Motors plant in Janesville, Wisconsin. On December 8, 2003, the Respondent learned that General Motors rejected its bid to continue performing this work and awarded the work to a competitor, Logistics Services, Inc. (LSI). On January 28, 2004,[6] the Respondent announced in a letter to the Union that it would close the facility and permanently lay off all employees in approximately 60 days (March 31). The letter stated, among other things, that medical, dental, and life insurance coverage would continue at no added cost for 31 days. On February 2, the Union, by International Representative Roger Anclam, requested that the Respondent bargain over the effects of the Respondent's closing its facility. On March 19, the parties met for approximately 45 minutes in their single face-to-face bargaining session without reaching agreement or bargaining to impasse. At that meeting, the Union presented its proposal for a closing agreement, which contained seven articles, four of which requested adherence to specific contractual obligations.[7] The Respondent, by its chief spokesman, John Webb, responded by claiming that, based on media reports, its employees would not experience any employment loss and that it had essentially no obligation to bargain for a closing agreement because LSI was a successor to the Respondent. Webb stated that if the Union did not agree with Respondent's successorship position, the Respondent would file an unfair labor practice charge against the Union with the Board, a copy of which

[1] The Respondent has excepted to the judge's granting of the General Counsel's *Motion in Limine* to strike seven of the Respondent's eight affirmative defenses. We find no merit in the Respondent's exception because we agree with the judge's finding that the affirmative defenses he struck were not relevant to the allegations in the complaint. The Respondent also argues that the motion, filed 2 weeks before the hearing and granted in a conference call 2 days prior to the beginning of the trial, was untimely. We find no merit in this argument as the timing of the motion complied with Sec.102.24 of the Board's Rules and Regulations and did not delay the hearing.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We have modified the recommended Order to accord with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[4] In adopting this conclusion, we find it unnecessary to rely on the judge's findings that the International Union, UAW, AFL–CIO was the only entity that had authority to enter into a binding collective-bargaining agreement or closing agreement, or that Roger Anclam and George Graf were the International representatives vested with such authority. Furthermore, we do not rely on the judge's reference to the unfair labor practice charge that the Respondent brought against the Union as evidence of the Respondent's bad faith. The judge also discussed three grievances that the Union filed against the Respondent; the Respondent excepted, asserting that the judge implicitly found the Respondent's denials of the grievances to be evidence of bad faith. In adopting the judge, we find it unnecessary to rely on or address the judge's discussion of the grievances. Finally, we disavow the judge's unnecessary "How generous" remark concerning the Respondent's agreement to allow employees to access their money in the Respondent's 401(k) plan.

[5] The facts set out here are those found by the judge, augmented by uncontroverted testimony in the record.

[6] All subsequent dates are in 2004.

[7] The Union's proposal requested, with reference to the parties' collective-bargaining agreement: employer-paid benefits for 6 months for permanently laid-off employees, compensation for current and accrued vacation pay, compensation for the Good Friday holiday, and compliance with certain seniority provisions. The proposal also requested the following noncontractual benefits: access to 401(k) accounts, payment of a severance package, and provision of recommendation letters.

charge was presented to the Union.[8] At the end of the meeting, Webb took the Union's proposal for a closing agreement, saying that the Respondent would cost it out and get back to the Union.

On March 22, the Respondent responded in writing to the Union's proposal. It rejected all of the Union's proposals for a closing agreement as "not applicable as no employment loss has occurred," except for the article that would permit employees to access their money in the Respondent's 401(k) plan.

During the following week, Webb exchanged several phone calls with various International and Local union officials[9] in which he insisted that LSI was a successor to the Respondent and the Union therefore should be enforcing the contract with LSI, rather than seeking to bargain with the Respondent for a closing agreement.[10] On March 24, Webb told Unit Chair Rich Johnson that the Respondent was not obligated to cover the benefits proposed in the articles and that the successor was obligated to provide the insurance benefits and vacation pay. When Johnson said that there were other things in the proposal "that needed to be looked at also," Webb told him to "put something on the table." On March 29, when Johnson told Webb that the local committee would drop three articles and reduce its request for insurance coverage, Webb replied that the Respondent had no obligation to provide insurance coverage. When Anclam called Webb later that day to follow up on Johnson's discussion of proposed modifications, Webb again argued that LSI was a successor and that the Respondent would pursue its unfair labor practice charge if the Union did not accede to this position. Webb added that if the Union had any proposals it should put them in writing. Anclam then faxed Webb an offer to move on the severance proposal and to discuss reducing the Respondent's obligations "through offsets that may take place with other employers." Anclam directed Webb to get in touch with Local Vice President Benash for further discussion as he would be out of town. The following day, March 30, Benash informed Webb by fax that he was awaiting Webb's written response. Webb did not respond.

On March 31, the Respondent closed its Janesville facility. Webb faxed a letter to UAW Regional Director Williams notifying him that the Respondent would provide the 31 days' "benefit continuation" (as it had committed to in its January 28 letter), but added that it was not obligated to pay for the benefits and would seek to recover costs pending the resolution of its unfair labor practice charge against the Union. Webb apparently also told employee and former Unit Chair John Schulte[11] that the Respondent would pay the accrued and current vacation pay. The Respondent did not communicate its closing terms to the Union's negotiators, or present these terms as bargaining proposals to the Union's negotiating committee.

On April 1, when it began operations, LSI retained 290 of the Respondent's employees. Approximately 70 remained on permanent layoff.[12] Webb conceded that he learned of these numbers on April 1. Also on April 1, Union Attorney George Graf called Webb to schedule discussion of a closing agreement. Webb replied, "TNT owes nobody anything because there is successorship with LSI." When asked to schedule a discussion, Webb replied, "I'll check my schedule and I'll get back to you on Monday." He did not. He conceded on cross-examination that after April 1 he made no attempt to contact the Union.

B. The Judge's Decision and the Respondent's Exceptions

In finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith with the Union,[13] the judge relied on the Respondent's claim at the March 19 meeting that it "had essentially no obligation" to bargain for a closing agreement. The judge also relied on the following: the Respondent met only once with the Union for less than an hour regarding a closing agreement; the Respondent rejected all the Union's proposals for a closing agreement as "not applicable" except the one that would allow employees to access their money in the Respondent's 401(k) plan; the Respondent filed an unfair labor practice charge against the

[8] On March 23, the Respondent filed the charge that Webb showed the Union at this meeting, and the Regional Director dismissed it on June 30.

[9] Specifically, Unit Chair Rich Johnson, Local 95 First Vice President James Benash, UAW Regional Director Dennis Williams, International Representative Anclam, and UAW Attorney George Graf.

[10] The judge found that LSI was a successor to the Respondent under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), but not a "perfectly clear" successor bound by the terms of any existing collective-bargaining agreement. *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975) (successor is not bound by the terms of an existing collective-bargaining agreement, unless it has made it "perfectly clear" that it plans to retain all the predecessor's employees). No party filed exceptions to these findings. The obligations of the successor do not relieve the predecessor of its own obligation to bargain about the effects of its own decisions.

[11] The judge found that Webb spoke to Johnson; the record indicates that Webb spoke with Schulte who then spoke to Johnson, and that Johnson ultimately conveyed this information to Benash.

[12] Thirty additional employees did not survive their probationary periods with LSI.

[13] In the proceeding below, the Respondent did not argue the position that it initially took with the Union that it had essentially no obligation to bargain for a closing agreement; rather, it asserted that it had fulfilled its duty to bargain in good faith.

Union; and, on and after April 1, when the Respondent was in the best position to negotiate a closing agreement because it then knew how many of its employees had been hired by LSI, the Respondent nevertheless failed and refused to meet with Union Attorney George Graf to negotiate a closing agreement although requested by Graf to do so. Because the judge found that the International Union, UAW, AFL–CIO was the only entity that had authority to enter into a binding collective-bargaining agreement or closing agreement, and that Roger Anclam and George Graf were the International representatives vested with such authority, he rejected the Respondent's contention that dialogue between Webb and various union officials without negotiating authority amounted to good-faith effects bargaining. The judge imposed a remedial order consistent with that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

In support of its argument that it fulfilled its duty to bargain in good faith, the Respondent primarily relies on telephone calls and faxes that Webb exchanged with various union officials from March 22 through April 1 and disputes the judge's finding that only Anclam and Graf of the International Union had negotiating authority. The Respondent also argues that it was unable to cost out the Union's proposal because it did not know how many of its former employees would be hired by LSI. Finally, the Respondent excepts to the judge's *Transmarine* remedy.

C. Analysis

Section 8(a)(5) of the Act requires bargaining "in a meaningful manner and at a meaningful time" over the effects of a decision to close a facility. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). A party who enters into negotiations with a predetermined resolve not to budge from an initial position demonstrates "an attitude inconsistent with good-faith bargaining." *General Electric Co.*, 150 NLRB 192, 196 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970), discussed in *American Meat Packing Corp.*, 301 NLRB 835 (1991). Nevertheless, the Board considers the context of the employer's total conduct in deciding "whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (quoting *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). In *Stevens International,* 337 NLRB 143, 149–150 (2001), the Board found that the respondent did not engage in good-faith effects bargaining. Although the respondent met with the union and invited it to propose terms for a plant closing agreement, the Board found bad-faith bargaining because the respondent summarily rejected the union's proposal without offering a counterproposal and failed to negotiate further, despite the union's offer to modify its proposal.[14] Furthermore, the existence of a successorship situation does not relieve an employer of its obligation to engage in effects bargaining. See, e.g., *Sierra International Trucks, Inc.*, 319 NLRB 948, 948–949 (1995) (after selling its business, employer unlawfully refused to engage in effects bargaining, even though all but two former employees continued to work for the successor without a break in employment).

We find that the Respondent's conduct here is inconsistent with the duty to bargain in good faith as applied in the above precedent. The Respondent had only one brief negotiating session with the Union and failed to respond to the Union's later requests for more bargaining. The Respondent never discussed with the Union's negotiating committee what might be acceptable closing terms nor did it make a counterproposal to the Union's proposal.[15] While an adamant insistence on a bargaining position is not itself a refusal to bargain in good faith, the Respondent's position that it had essentially *no* obligation to bargain is not the same as lawful hard bargaining, in which a party insists on a position "to achieve a contract it considers desirable."[16] Webb's consistent message to the Union was that the Respondent had no obligation to negotiate a closing agreement because the successor, LSI, was obligated to provide benefits for affected employees.

The Respondent never moved from that position, even after April 1 when LSI took over operations and the Respondent learned that LSI had not offered jobs to approximately 70 bargaining unit employees, contrary to the Respondent's prior claim that there would be no employment loss. Moreover, prior to April 1, the Respondent justified its failure to bargain, in part, on its inability to cost out the Union's proposal without knowing how many employees would be out of work. After April 1, that justification no longer existed. As the judge observed, even after the Respondent learned that 70 of its employees had not been retained, it nevertheless failed to respond to the Union's bargaining request.

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[14] See also *Dallas & Mavis Specialized Carrier Co*., 346 NLRB 253, 257 (2006) (finding no good-faith bargaining where the respondent listened and responded to the union's proposal regarding the effects of ceasing operations but then summarily rejected all but one of the union's proposals without providing an explanation or counterproposal, and did not respond when the union requested further bargaining).

[15] Ibid.

[16] *Atlanta Hilton*, 271 NLRB at 1603 (internal quotations and citation omitted).

Despite its initial position that it had no obligation to bargain, the Respondent points to the fact that Webb and various union officials exchanged phone calls and faxes as evidence of good-faith bargaining. Webb's communications to the Union after March 22 primarily involved Webb's insistence that the Union seek benefits from the successor rather than pursue effects bargaining with the Respondent. We cannot agree that its continued insistence that the Union not pursue effects bargaining evidences good-faith bargaining by the Respondent.[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, TNT Logistics North America, Inc., Janesville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain collectively and in good faith with the International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO concerning the effects resulting from the closure of its Janesville, Wisconsin facility on March 31, 2004, on its employees in the following appropriate unit:

> All full-time warehouse, and maintenance employees, and local truck drivers, employed by the Employer within a fifty (50) mile radius, that serves Janesville GM Assembly Plant excluding clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union concerning the effects on employees which it represents resulting from the closing of its Janesville, Wisconsin facility on March 31, 2004.

(b) Make all employees represented by the Union who were terminated on March 31, 2004, as a result of the closing of the Janesville facility whole in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region mail copies, at the Respondent's expense, of the attached notice marked "Appendix"[18] to the last known address of each employee employed in the unit represented by the Union; and similarly mail a copy of the notice to the Union at its business address. Copies of the notice, on forms provided by the Regional Director for Region 30, shall be mailed after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Anita C. O'Neil, Esq., for the General Counsel.
James M. Walters and *Jenna S. Barresi, Esqs. (Fisher & Phillips, LLP),* of Atlanta, Georgia, for the Respondent.
George F. Graf, Esq. (Gillick, Wicht, Gillick, and Graf), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On April 15, 2004, the International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), filed a charge in Case 30–CA–16801–1, against TNT Logistics North America, Inc. (the Respondent).

On September 29, 2004, the National Labor Relations Board (the Board), by the Acting Regional Director for Region 30, issued a complaint alleging that Respondent since March 22, 2004, has failed and refused to bargain collectively with the collective-bargaining representative of its employees about the effects of its closing its facility in Janesville, Wisconsin, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Respondent filed an answer in which it denied that it violated the Act in any way.

[17] Chairman Battista notes that the Respondent may have had a genuine good-faith belief in the legal correctness of its position and that it was privileged to advance and seek to preserve that position. Merely maintaining and asserting a bona fide, legal position does not violate Sec. 8(a)(5). Nevertheless, the Respondent acted at its own peril when, in reliance on that legal position, it failed to engage in meaningful effects bargaining with the Union.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

A hearing was held before me in Milwaukee, Wisconsin, on April 20 and 21, 2005.[1]

On the entire record in this case, to include posthearing briefs submitted by counsel for the General Counsel, counsel for the Respondent, and counsel for the Charging Party and giving due regard to the testimony of the witnesses and their demeanor, I make the following

I. FINDINGS OF FACT

At all material times, Respondent, a corporation, with an office and place of business in Janesville, Wisconsin, has been a provider of logistic services for manufacturing organizations.

Respondent admits, and I find, that at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time warehouse, and maintenance employees, and local truck drivers, employed by the Employer within a fifty (50) mile radius, that serves Janesville GM Assembly Plant excluding clerical employees, professional employees, managerial employees, guards and supervisor as defined in the Act.

Since June 30, 1997, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit. From June 30, 1997, to September 4, 2000, the Union was recognized as a representative by Customized Transportation, Inc. (CTI). This recognition was embodied in successive collective-bargaining agreements, the most recent of which is effective November 16, 2000, until November 16, 2004.

On or about September 4, 2000, Respondent purchased CTI, recognized the Union as the designated exclusive collective-bargaining representative of the unit, and assumed the collective-bargaining agreement between CTI and the Union described above.

Respondent admits that at all times since June 30, 1997, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the unit.

On December 8, 2003, Respondent learned that its bid to continue performing work for General Motors was rejected and that this work was awarded to a competitor, Logistics Services, Inc. (LSI).

On January 28, 2004, Respondent announced that it was closing its facility in Janesville, Wisconsin, due to the loss of its only customer, General Motors, and sent the following letter to the Union.

> January 28, 2004
>
> Mr. Mike Sheridan
> President
> UAW Local 95
> 1795 Lafayette Street
> P.O. Box 1386
> Janesville, WI 53547
>
> Dear Mike:
>
> This will serve to inform you that TNT Logistics North America Inc. is closing its General Motors, Janesville, Wisconsin facility because of a loss of business. As a result, TNT will initiate a permanent layoff. As part of this permanent layoff, the employment of all bargaining unit employees will be terminated effective sixty days beginning the day after receipt of this correspondence. Insofar as this represents a total loss of business, there are no "bumping rights" in connections with this permanent layoff.
>
> Bargaining unit employees will be eligible to receive their usual pay and benefits under ERISA Benefit Plans prior to date of layoff. If bargaining unit members are enrolled in the TNT's medical, dental, and life insurance plans, coverage under these plans will continue at no additional cost for 31 days beginning the first day of the month following the employees' termination date. Bargaining unit employees will be eligible to elect an extension of group medical, dental, or HMO coverage under applicable law, provided this election is made within 60 days of termination date. If continuation is elected the bargaining unit employees will be responsible for the cost of the coverage.
>
> I regret that this notice of permanent layoff must be given. If you have any questions, please feel free to contact me.
>
> Sincerely,
>
> John D. Webb

On February 2, 2004, the Union, by International Representative Roger Anclam, requested that Respondent bargain collectively with the Union as the exclusive bargaining representative of the unit over the effects of Respondent closing its facility in Janesville, Wisconsin.

On Friday, March 19, 2004, Respondent and the Union met to bargain over the effects of Respondent's facility closing without reaching an agreement or bargaining to a good-faith impasse.

It is alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the Union about the effects of its closing of its plant.

What is effects bargaining? In this case Respondent lost its only customer, General Motors. General Motors decided to switch its business from Respondent to a competitor, LSI.

[1] Respondent's motion to correct transcript, as modified by the General Counsel's response to the motion to correct transcript, is granted. The audiotapes of the hearing should be secured so that, in the unlikely event this becomes an issue before the Board or courts, they will be available.

It is conceded by all the parties to this litigation that Respondent was legally entitled, having lost the work to a competitor, to close its Janesville, Wisconsin facility. The only duty Respondent had under the circumstances of this case was to bargain in good faith with the representative of its employees about the effects of its closing of the Janesville, Wisconsin facility. See *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

Effects bargaining or bargaining for a "closing agreement," as it was sometimes referred to in this litigation, is the duty to bargain about the effects of the closing of the business on its represented employees, e.g., vacation pay, holiday pay, access to 401(k)s, severance pay, letters of recommendation for employees losing their jobs, continuation of health or life insurance, etc.

The General Counsel and the Union argue that Respondent failed in its duty to bargain in good faith over the effects of its closing of the Janesville, Wisconsin facility. Respondent argues that it did bargain in good faith.

I find that Respondent violated the Act as alleged in the complaint.

B. Motion in Limine

In its answer to the complaint Respondent pleaded eight affirmative defenses. The General Counsel filed a Motion in Limine seeking to strike seven of the eight affirmative defenses.

I granted the General Counsel's Motion in Limine during a telephone conference call with the lawyers for the General Counsel, Respondent, and the Charging Party on April 18, 2005, 2 days prior to the beginning of the trial. I gave Respondent's counsel an opportunity to state on the record why he felt the Motion in Limine should have been denied and why he needed the evidence he thought he could produce in support of those affirmative defenses. Respondent did so at the end of his case on April 21, 2005.

Suffice it to say I granted the motion, because the affirmative defenses I struck were not, in my judgment, relevant to the allegations in the complaint.

As noted above, General Motors decided on December 8, 2003, to have the work done by Respondent transferred to LSI.

The Union was under no obligation to make concessions in its collective-bargaining agreement with Respondent, which ran from November 16, 2000, to November 16, 2004, so that Respondent could submit a more favorable bid to General Motors in hopes of keeping the work that General Motors decided to transfer to LSI.

C. Discussion

The only time the parties met face to face to engage in effects bargaining was on Friday, March 19, 2004. The meeting lasted approximately 45 minutes. There were approximately 360 employees in the bargaining unit.

At that meeting, the Union presented their proposal for a closing agreement. It contained seven articles and was as follows:

> Due to the permanent layoff and plant closing announced and scheduled by TNT, Inc. of its Janesville, Wisconsin operation, UAW Local 95, Unit #13 is proposing the following as a closing agreement.
>
> ARTICLE I
>
> The Company will provide benefits to all eligible Bargaining Unit employees as outlined in the Collective Bargaining Agreement in Article XVIII, Section 4D.
>
> ARTICLE II
>
> The Company will compensate all eligible bargaining unit employees for current vacation entitlement balances and accrued entitlement balances, under Article XXI, to be paid on the pay checks of March 25, 2004.
>
> The Company will provide a list indicating all such hours for all employees.
>
> ARTICLE III
>
> The Company will allow bargaining unit employees who are 401K participants under Article XIX the ability to access their accounts for the purpose of directing, redirecting, removing or transferring funds at the participant's discretion.
>
> ARTICLE IV
>
> The Company will pay severance pay to all bargaining unit employees based on a formula of 40 hours pay for each year of service and partial years paid at 1/12 (3.33 hours) of 40 hours for each full month.
>
> ARTICLE V
>
> The Company will provide letters of recommendation for the purpose of seeking employment to all bargaining unit employees who request a letter.
>
> ARTICLE VI
>
> Per Article XX Section 3 of the Collective Bargaining Agreement, the Company will compensate all eligible bargaining unit employees for the Good Friday Holiday for 10 hours pay at the appropriate rate.
>
> ARTICLE VII
>
> The Company will comply with Article X Section 3 E and all other provisions of the Collective Bargaining Agreement.

At the meeting on March 19, 2004, Respondent, by its chief spokesman, John Webb, claimed that Respondent had essentially no obligation whatsoever vis-a-vis a closing agreement because LSI was a successor to Respondent and the people represented by the Union were not entitled to anything from Respondent. Webb presented a typed record of news accounts from the newspaper and radio that suggested that Respondent's employees would be hired by LSI. Webb also threatened to file an unfair labor practice charge with the Labor Board alleging that the Union had violated the Act. Webb produced a copy of a Labor Board charge and presented it to the Union at this meeting.

The alleged unfair labor practice the Union allegedly committed was as follows:

> Since on or about September 22, 2003, the above-named labor organization, by and through its officers, agents and representatives of UAW Region 4, [7435 South Howell Avenue, Oak Creek, Wisconsin 55154; attention: Mr. Roger Anclam, International Representative], and its Local Union No. 95 [1795 Lafayette Street, Janesville, Wisconsin 53547-1386, attention: Mr. Mike Sheridan, President], has failed and refused to bargain in good faith with representatives of TNT Logistics North America, Inc. (TNT), by engaging in the following actions:
>
> (a) Refusing TNT's good-faith request for necessary contract modifications;
>
> (b) Engaging in bargaining with Logistics Services, Inc. (LSI) and its subsidiary Logistics Insight, Inc. (L11) [2929 Venture Drive, Janesville, Wisconsin 53546; attention: Mr. Don Bergquist, Operations Manager] a presumptive successor to TNT, over the terms and conditions of employment for present and former TNT employees not yet hired by LSI/LII, all to the economic and bargaining detriment of TNT.

At the end of the meeting on March 19, 2004, which lasted less than an hour, Webb took the Union's seven article proposal for a closing agreement, said Respondent would cost it out, and get back to the Union.

On Monday, March 22, 2004, 3 days later, Respondent responded in writing to the Union's proposal as follows:

> ARTICLE I
>
> TNT rejects this proposal as "not applicable" as no employment loss has occurred as contemplated by federal or state law, the collective bargaining agreement, or any side letters of agreement or understanding thereto that would result in a triggering of the language referenced by the Union in its proposal.
>
> ARTICLE II
>
> TNT rejects this proposal as "not applicable" as no employment loss has occurred as contemplated by federal or state law, the collective bargaining agreement, or any side letters of agreement or understanding thereto that would result in a triggering of the language referenced by the Union in its proposal.
>
> ARTICLE III
>
> TNT will allow bargaining unit members who are participants in TNT's 401(k) to access their accounts for purposes of facilitating bargaining unit members' participation in any corresponding 401(k) offered by the successor employer of the bargaining unit members.
>
> ARTICLE IV
>
> TNT rejects this proposal as "not applicable" as no employment loss has occurred as contemplated by federal or state law, the collective bargaining agreement, or any letters of agreement or understanding thereto that would result in the necessity of consideration of such a proposal.
>
> ARTICLE V
>
> TNT rejects this proposal as "not applicable" as no employment loss has occurred as contemplated by federal or state law, the collective bargaining agreement, or any letters of agreement or understanding thereto that would result in the necessity of consideration of such a proposal.
>
> ARTICLE VI
>
> TNT rejects this proposal as "not applicable" as no employment loss has occurred as contemplated by federal or state law, the collective bargaining agreement, or any side letters of agreement or understanding thereto that would result in a triggering of the language referenced by the Union in its proposal.
>
> ARTICLE VII
>
> TNT rejects this proposal as "not applicable" as no employment loss has occurred as contemplated by federal or state law, the collective bargaining agreement, or any side letters of agreement or understanding thereto that would result in the triggering of the language referenced by the Union.

As can be seen Respondent rejected out of hand as "not applicable" all of the Union's proposals for a closing agreement except article III which would permit employees to access their very own money in Respondent's 401(k) plan. How generous.

The very next day Tuesday, March 23, 2004, Respondent filed a charge in Case 30–CB–4907 against the Union with Region 3 in Milwaukee, Wisconsin.

The charge was the same as the charge Respondent threatened to file against the Union at their one and only face to face effects bargaining meeting just 4 days earlier.

It was not until April 1, 2004, that Respondent and the Union knew how many of Respondent's employees would be hired by LSI. Not all employees of Respondent were hired by LSI, but a majority of 290 out of approximately 360 were hired. Of the 290 hired 30 failed to successfully complete their probationary period with LSI and were terminated.

The Region dismissed Respondent's charge against the Union on June 30, 2004, pointing out, inter alia that LSI was a successor to Respondent because a majority of LSI's employees are former employees of Respondent and LSI is performing essentially the same work with the same equipment. And, for the same customer of course, General Motors. However, a *Burns*[2] successor, while obligated to bargain with the Union, is not bound by the terms of any existing collective-bargaining agreement and is free to unilaterally set new terms and conditions of employment unless, as found in *Spruce Up Corp.*,[3] that by its conduct the successor has made it "perfectly clear" that it

[2] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[3] 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975).

plans to retain *all* the predecessor's employees as a majority of its own work force, which LSI did not do. And this is true even if, as in this case, there is a clause in the collective-bargaining agreement between Respondent and the Union binding successors as there was in this case.

Under Section 8(d) of the Act neither party to a collective-bargaining agreement—such as Respondent and the Union with respect to the November 16, 2000, to November 16, 2004 collective-bargaining agreement—is required to "discuss or agree to any modification of terms and conditions contained in a contract for a fixed period" if the modification is to become effective before the contract expires or before the matter can be reopened under the provisions of the contract.

George Graf, Esq., is an attorney who has represented the Union for years. He was present at the one and only face to face effects bargaining session on March 19, 2004.

On April 1, 2004, Graf spoke with Respondent's chief negotiator, John Webb, seeking to get together with Webb to hammer out a closing agreement. Webb never got back to Graf to have such an effects bargaining session or sessions.

Interestingly enough it was not until April 1, 2004, and thereafter that the parties would be in the best position to hammer out a closing agreement, because it was only on April 1, 2004, and thereafter that the parties knew how many of Respondent's employees would be hired by LSI and would, therefore, be eligible for health insurance from LSI after 3 months with LSI. And how many employees not hired by LSI would need letters of recommendation because they would be out of work. As it turned out LSI hired 290 of Respondent's employees. Seventy were not hired and 30 former employees of Respondent hired by LSI did not survive their probationary period with LSI.

The following are the facts: that Respondent met once and only once with the Union for less than an hour regarding a closing agreement; that Respondent threatened to file unfair labor practice charges against the Union at that single meeting; that Respondent promised to report back to the Union after costing out the Union's proposals for a closing agreement; that Respondent, just days later, summarily rejected all the Union's proposals for a closing agreement except the one that would allow employees to access their very own money in Respondent's 401(k) plan; that Respondent just 4 days after meeting with the Union filed unfair labor practice charges against the Union which were dismissed; that on and after April 1, 2004, when Respondent was in the best position to negotiate a closing agreement because it now knew how many of its employees had been hired by LSI Respondent nevertheless failed and refused to meet with Union Attorney George Graf to negotiate a closing agreement although requested by Graf to do so. In light of these facts it is obvious that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to engage in good faith effects bargaining.

D. Union Officials' Authority to Negotiate a Closing Agreement

The Charging Party in this case, i.e., International Union, UAW, AFL–CIO, was the only entity that had authority to enter into a binding collective-bargaining agreement or closing agreement. The International representative with such authority was Roger Anclam, the principal spokesman for the Union at the March 19, 2004 effects bargaining session. On and after April 1, 2004, Attorney George Graf had such authority.

UAW Local 95 is an amalgamated local union with 6000 members broken down into 14 units. Unit 13 was the TNT bargaining unit with approximately 360 unit employees. Local 95 First Vice President Jim Benash was assigned to unit 13 and Richard Johnson, prior to March 31, 2004, was the chairman of the unit 13 committee. Benash and Johnson were without authority to enter into a closing agreement. Again, it had to be a representative of the International. In this case that would be Roger Anclam or Attorney George Graf on behalf of the International. Dialogue between Webb for Respondent and others from the Union without authority to negotiate a closing agreement does not amount to good-faith effects bargaining. In a conversation on or about March 31, 2004, between Respondent's John Webb and unit 13's Richard Johnson Webb agreed to pay Respondent's employees their accrued vacation pay.

E. Three Grievances

Three separate grievances were filed by the Union during the period between December 8, 2003, when General Motors informed Respondent that it would no longer be doing the sequencing work at its Janesville facility and April 1, 2004, when LSI took over.

Grievance 2416 filed on February 13, 2004, requested that permanently laid off employees receive health insurance coverage pursuant to article XVIII, section 4(d) which called for 6 months of paid benefits for permanently laid-off employees. By letter dated February 17, 2004, John Webb offered to meet on this grievance. The grievance was never resolved and the permanently laid-off employees received the amount of paid insurance Respondent said it would provide in its letter to the Union of January 18, 2004, advising the Union of the closing of the facility, i.e., "31 days beginning the first day of the month following the employees' termination date." This letter is set out in full in section III,A of this decision. The content of Respondent's letter was not good-faith effects bargaining but the announcement of a fait accompli.

Grievance 2474 filed on March 25, 2004, requested that Respondent comply fully with the provisions of article 18 (Insurance), article 20 (Holidays), and article 21 (Vacations). Grievance was denied by Respondent which took the position it would only comply with the contract between it and the Union up to March 31, 2004, when its operations would be turned over to LSI.

Grievance 2477 filed on March 29, 2004, requested that Respondent continue to provide health insurance for employees hired by LSI for 90 days after their employment with Respondent terminated and for 6 months for those employees not hired by LSI. Respondent denied the grievance consistent with its position at the bargaining session on March 19, 2004, i.e., Respondent's employees should be looking to LSI as a successor for insurance coverage and not Respondent. These employees hired by LSI would not receive insurance coverage from LSI until they had worked for LSI for 3 months. In its letter dated January 18, 2004, Respondent advised the Union that all em-

ployees would get 31 days of insurance coverage after termination as spelled out above when discussing grievance 2416 and in section III,A, above.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to bargain in good faith with the Union concerning the effects on employees of its closing of its Janesville, Wisconsin facility, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.
4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Since Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to engage in good-faith effects bargaining the remedy should include a cease-and-desist order along with the remedy spelled out for situations such as this in the Board's landmark decision in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). See also *Sierra International Trucks, Inc.*, 319 NLRB 948 (1995).

The Board in *Transmarine* required that an employer who has unlawfully refused to engage in effects bargaining provide unit employees with a minimum of 2 weeks' backpay.[4] The goal of the limited backpay requirement is both to make employees whole for losses suffered as a result of the 8(a)(5) violation, and to recreate in a practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the employer. The Respondent has a duty to bargain over such matters as severance pay, payment of accrued benefits, continuation of health benefits for employees not reemployed by the new employer, etc. Its failure to do so requires that employees be made whole for losses incurred by such failure.

The Respondent argues that a *Transmarine* backpay award is inappropriate in a situation when, as here, most of its employees secured employment with the new employer, and so have purportedly suffered less losses. In the *Raskin Packing Co.,* 246 NLRB 78 (1979), case, the Board in determining that a *Transmarine* backpay award would be inappropriate relied in part on the fact that a successor employer offered employment to all former employees of a closed plant. The Board seemed to rely more heavily, however, on the fact that the former employer had closed the plant in an emergency situation, such that the union was never in a position to bargain over effects, there having been no possible way to bargain over effects before the closing. That is not the case here, the Union having requested effects bargaining on February 2, 2004, 2 months before the plant closed.

In *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990), also a successorship case, the Board declined to address whether the 2 weeks' backpay remedy should be applied regardless of loss to employees, finding that it was not clear that employees had not suffered any loss. The Board found a *Transmarine* remedy appropriate, however, where the union might have been able to secure additional benefits for employees. Also in *Richmond Convalescent Hospital,* 313 NLRB 1247 (1994), the backpay remedy was awarded where the union requested effects bargaining "at a time when the Union might have secured additional benefits for employees had the Respondents bargained in a timely manner over effects." In both of these cases, the Board's reference to a time when the union "might have" been able to secure additional benefits clearly refers to the bargaining strength only available to a union when bargaining is timely. Likewise, the reference in *Raskin* to the union's not being "in a position of strength at a time when any bargaining about effects could have taken place" explicitly refers to the previous sentences in that decision, in which the Board found that effects bargaining was not possible at any time previous to the plant closing, making timely bargaining impossible:

> Respondent's failure to bargain about effects here did not occur at a time the plant was still open. Respondent closed the plant in an almost emergency situation, and there was no way to bargain about effects before the closing. Thus, the predicate for the back pay awards in all the cases cited disappears, for the union was never in a position of strength at a time when any bargaining about effects could have taken place.

Similarly, it does not seem necessary in this case to determine the extent of "actual" loss to employees. The Respondent's failure to bargain over the effects of the loss of the business to LSI resulted in the Union's inability to bargain for additional benefits, such as severance pay, and the employees' concomitant loss of these potential additional benefits. The *Transmarine* backpay remedy would therefore be appropriate in this situation, serving to restore the Union's bargaining position to one with economic consequences should the Respondent continue in its refusal to bargain.

Accordingly, the Respondent must bargain in good faith concerning the effects of the closing of its business. Backpay is awarded in accord with *Transmarine*, to unit employees commencing 5 days after the date of the Board's Decision and Order in this case. Backpay is to be computed using the *F. W. Woolworth*[5] calendar quarterly formula, adding interest as required in *New Horizons for the Retarded.*[6]

[4] The Board in *Transmarine* ordered an employer who had refused to bargain over the effects on unit employees of a plant closure decision to pay the employees at their normal rate of pay beginning 5 days after the Board's decision until (1) an effects bargaining agreement was reached; (2) a bona fide bargaining impasse was reached; (3) the union failed to timely request or commence bargaining; or (4) the union failed to bargain in good faith—whichever event occurred first. Further, "in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ."

[5] 90 NLRB 289 (1950).

[6] 283 NLRB 1173 (1987).

The recommended Order provides for the mailing of the attached notice to employees which serve to advise the unit employees of their rights and the outcome of this matter.

[Recommended Order omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to bargain collectively and in good faith with the International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO concerning the effects resulting from the closure of our Janesville, Wisconsin, facility on March 31, 2004 on our employees in the following appropriate unit:

> All full-time warehouse, and maintenance employees, and local truck drivers, employed by the Employer within a fifty (50) mile radius, that serves Janesville GM Assembly Plant excluding clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL, on request, bargain with the Union concerning the effects on our employees in the above unit resulting from the closure of our Janesville, Wisconsin facility.

WE WILL pay employees in the above unit who were terminated on March 31, 2004 certain wages, with interest, as provided in the decision of the National Labor Relations Board.

TNT LOGISTICS NORTH AMERICA, INC.